BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The trial court rendered no written opinion in this case, and its judgment can be found on page 137 of the Record.

The opinions of the Courts of Civil Appeals of Texas are not officially reported, but the opinion of the San Antonio Court of Civil Appeals in this case is reported in 151 S. W. (2d) 609, and can be found in the Record at page 153, as well also as in the appendix hereto (post, pp. I-V).

The Supreme Court of Texas rendered no written opinion, but simply dismissed the case with the notation "W. O. J.—Correct Judgment." (Record, 176).

II.

JURISDICTION.

1. The date of the decision of the Court of Civil Appeals sought to be reviewed is April 30th, 1941. (R. 153). The motion for rehearing was timely filed on May 14th, 1941 (R. 157), which was considered and overruled without additional opinion on May 28th, 1941. (R. 168). Petitioner timely filed its application for writ of error in the Supreme Court of Texas, on June 23rd, 1941 (R. 168), and this application was by that court dismissed on July 16th, 1941 (R. 176). Petitioner timely filed its motion for rehearing of its application on July 30th, 1941 (R. 177), which was overruled on October 15th, 1941. (R. 176).

2. The jurisdiction of this Court is invoked under the provisions of U. S. C. A., Title 28, Chapter 9, Section 344-

(b), as amended by the Act of February 13th, 1925, Chapter 229, Section 1.

3. The following authorities sustain the jurisdiction of this Court to entertain Petition for Writ of Certiorari: *Zucht vs. King*, 260 U. S. 174, 177; *Southwestern Bell Tel. Co. vs. Oklahoma*, 303 U. S. 206; *Ancient Egyptian Arabic Order etc. vs. Michaux*, 279 U. S. 737, 745; *Ward vs. Love County*, 253 U. S. 17; *Norris vs. Alabama*, 294 U. S. 587, 589; *Lawrence vs. Mississippi*, 286 U. S. 276, 282.

A more detailed statement with respect to the jurisdiction of this Court is found under corresponding caption in the petition, pages 4 to 10 hereof, and a statement of the reasons relied on for the allowance of the writ is set forth in the petition, pages 13 to 15, to both of which reference is here made.

III.

STATEMENT OF THE CASE.

A statement of all the matters material to this controversy has been made under the first section of the petition herein (ante, p. 1), which is here adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

1. The Court of Civil Appeals erred in not holding that the rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A,

(a) constituted a denial to Lawther (and to petitioner, sought to be bound through him) of the equal protection of the laws of Maryland (Section 153) in the matter of personal service of process with that enjoyed by other

residents of Maryland, in violation of the Fourteenth Amendment of the Constitution of the United States, in that it puts a penalty upon his being in the service of his country and makes a discrimination against him and all other soldiers subject to the will of the United States Government in the matter of military station, although they are actually stationed, resident and available to service of process in the ordinary way (as urged by petitioner's Point 13 in its brief in that court, R. 149-50);

(b) and constituted a deprivation of his property (as well as the property of petitioner, sought to be bound through him) without due process of law in the matter of personal service, as provided for by Section 153, which is guaranteed to him (and to petitioner) by the Fourteenth Amendment of the Constitution of the United States (as urged by petitioner's Point 12 in its brief in that court, R. 149).

2. The Court of Civil Appeals erred in not holding that the rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A,

(a) constituted a deprivation of his property (as well as the property of petitioner, sought to be bound through him) without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, in that Section 190A, when thus applied, imposed as a condition of Lawther's continued use of the highways of Maryland a constructive appointment of a state officer for the purpose of substituted process thereunder, although Law-

ther more than three months before the collision occurred had already bought and paid for the right to use the highways of Maryland as a resident Maryland licensed operator, driving a Maryland licensed automobile (as urged by petitioner's Point 8 in its brief in that court, (R. 147);

(b) constituted a denial to him (and to petitioner, sought to be bound through him) of the equal protection of the laws of Maryland with that enjoyed by other residents of Maryland who, like Lawther, had, long before the collision occurred, bought and paid for the right to use the highways of Maryland as a resident Maryland operator, driving a Maryland licensed automobile, in violation of the Fourteenth Amendment of the Constitution of the United States (as urged by petitioner's Point 8 in its brief in that court, R. 147).

3. The Court of Civil Appeals erred in construing Section 190A as including within its substituted service provision for a "non-resident" a soldier in the United States Army having his residence and actual abode on the government reservation at Fort Hoyle, Maryland, throughout the period of the collision and the subsequent Maryland suits and judgments. This is true for each of the four reasons shown under subdivision (5) of the "Questions Presented" in the petition herein (ante, p. 12), to-wit: The ordinary meaning of the word "non-resident" excludes any element of intention, this law has in view protection against inaccessibility to ordinary process, such ordinary process can be had upon government reservations, and any other construction of the law would render it unconstitutional for the reasons shown above.

V.

ARGUMENT.

An outline summary of the argument can be found by a glance at the subject index.

THIS COURT HAS JURISDICTION OF THE QUESTIONS PRESENTED.

In the first place, the Texas courts had jurisdiction of the issue raised on the jurisdiction of the Maryland courts over Lawther for the purpose of default judgments in personam. Though the latter were courts of general jurisdiction, in this suit upon those judgments in Texas their jurisdiction over the person of Lawther was open to inquiry, and since the existence of "the Federal right turns on the meaning and effect of the California (here, Maryland) statute the decision of the Texas courts on that point, whether of law or of fact, is reviewable here." *Adam vs. Saenger*, 303 U. S. 59, 62-4; *Milliken vs. Meyer*, 311 U. S. 457, 462. The question of law arising upon the construction and application of the Maryland statutes and decisions as affecting jurisdiction over Lawther *(Banco Minero vs. Ross*, 106 Tex. 522, 535-6, 172 S. W. 711; *Finney vs. Guy*, 189 U. S. 333, 47 L. Ed. 839, 844), not having been litigated in the Maryland courts, must now be determined, regardless of the recitals in the original judgments *(Morehead vs. Bank*, 62 S. W. [2] 184, 186; *Cooper vs. Newell*, 173 U. S. 555, 566), and this action may be had by petitioner, against whom these judgments are here undertaken to be enforced. *State Mortgage Corporation vs. Traylor*, 120 Tex. 148, 36 S. W. (2) 440, 443. Respondents having here plead the Maryland judgment records and attempted to allege and prove due services of process, an issue was joined by petitioner's general denial. *Morehead vs. Bank*, supra.

In the second place, the Federal questions now presented have been urged throughout, and they being besides fundamentally involved in a determination of the cause *(Southwestern Bell Telephone Co. vs. Oklahoma,* 303 U. S. 206, 212), it can make no difference that the State courts never actually decided such questions. The non-federal grounds of decision by the Court of Civil Appeals are too unsubstantial to justify an avoidance of constitutional obligations, and, as presently shown, are too lacking in fair support to foreclose this Court's jurisdiction. *Lawrence vs. Mississippi,* 268 U. S. 276, 282; *Ancient Egyptian Arabic Order vs. Michaux,* 279 U. S. 737, 745; *Ward vs. Love Co.,* 253 U. S. 17; *Norris vs. Alabama,* 294 U. S. 587, 589.

Petitioner has consistently claimed that Section 190A of the Maryland code, properly construed, has no application to an actual resident of Maryland easily available to ordinary process, and that the rendition of the Maryland judgments against Lawther violated his constitutional rights in the manner before shown (ante, p. 5).

On the other hand, the Court of Civil Appeals put aside the Federal questions thus pressed upon it and its opinion (Appendix, pp. I-V) determines the case upon the theory that Section 190A is to be construed as including within its substituted service provision a soldier in the United States Army having his residence and actual place of abode in Fort Hoyle, Maryland, throughout the period of the collision and the subsequent Maryland suits and judgments. Plainly, if this construction of Section 190A is wrong, then it must follow that the rendition by the Maryland courts of the default judgment against Lawther were unwarranted by law and constituted violations of the Federal Constitution in the particulars claimed.

And, in this connection, it can make no difference at all that the facts may show that Lawther had actual knowledge

of the existence of the Maryland suits, whether through the statutory notice or otherwise. *Wuchter vs. Pizzutti*, 276 U. S. 13, 24; *Employers Liability Assurance Corporation vs. Perkins*, 181 Atl. 436, 169 Md. 269; *Wilmer vs. Epstein*, 81 Atl. 379, 382, 116 Md. 144; *Harrell vs. Mexico Cattle Co.*, 73 Tex. 612, 615, 11 S. W. 863.

The Ordinary Meaning of the Word "Residence" is Simply Where One Lives, His Place of Physical Abode.

The view of the Court of Civil Appeals that the word "non-resident", as used in Section 190A, is to be construed as including within its substituted service provision a soldier in the army having his actual place of abode in Fort Hoyle, Maryland, is apparently founded mainly upon the fact of a soldier's military station being controlled by the government, preventing usually any independent domiciliary intention on his part, in connection with the erroneous theory that the ordinary and even necessary meaning of the word "residence" involves the element of intention.

It is said "there would *have* to be facts and circumstances tending to show that Lawther *intended* to establish his residence" and "a person's residence is *ordinarily* determined by his *intention.*" (Appendix, p. IV).

On the other hand, we direct attention to the following controlling authorities:

Our Supreme Court in *Pecos N. T. Ry. Co. vs. Thompson*, 106 Tex. 456, 460, 167 S. W. 801, in searching out a definition of the term "non-resident", quotes as follows from another case, thereafter specifically applying such quotation to the holding that the defendant "resided—i. e.—was bodily present—within the State of Texas * * *":

> " 'Residence means *living in a particular locality,* but domicile means living in that locality with the intent to make it a fixed and permanent home. Residence *simply requires bodily presence* as an inhabitant in a given place, while domicile requires bodily presence in that place, and also an intention to make it one's domicile.' Rawstrone vs. McGuire, 192 N. E. 294, 265 N. Y. 204."

See also *Major vs. Loy,* 155 S. W. (2) 617, 621 (Tex. Ct. Civ. Appls.).

Which is right, the Court of Civil Appeals herein or our Supreme Court?

Again, looking to the Maryland law, it is said by the Maryland Court of Appeals in *Harrison vs. Harrison,* 84 Atl. 57, 58, 117 Md. 607:

> "The term 'residence' is one which is used to signify different things. Sometimes it is to be construed as meaning the domicile of a party, and in others *simply to indicate an abiding place* for the time being."

In *Douglas vs. N. Y. N. H. Ry. Co.,* 279 U. S. 377, 386, this Court, speaking through Justice Holmes, says:

> "There is nothing to prohibit the Legislature from using 'resident' in the strict *primary sense of one actually living in the place for the time,* irrespective even of domicile."

See also *Fisher vs. Jordan,* 116 Fed. (2) 183, 186 (5th Cir.).

In 19 *C. J.* 395, it is said:

> "Residence simply indicates the place of abode, whether permanent or temporary; domicile denotes a fixed, permanent residence, to which, when absent, one has the intention of returning."

In 54 *C. J.* 702, it is said in definition of the word "reside":

> "*In the ordinary sense:* to abide continuously, to sojourn, to dwell permanently or for a length of time; to be present; to be settled as in a home; to have a settled abode for a time, or a dwelling, a home; to have one's dwelling or home; to live in a place; to make an abode for a considerable time, to remain for a long time; to stay. Also to be in official residence, to continue to sit; to exist as an attribute of, inhere.
>
> "*In a legal sense:* While the word does not necessarily apply to a legal residence, still it may refer to a person's legal residence and mean an established place of abode, adopted with no present intention of moving elsewhere, being synonymous with 'domicile' in its strict legal sense; and although it means something different from being bodily present, yet in statutes it may be used as meaning actually to occupy or to live, or it may be employed as synonymous with being a 'citizen' or an 'inhabitant.'"

In 39 *Tex. Jur.* 199, it is said:

> "Construction of a word in its ordinary, rather than in a technical sense, is generally to be preferred."

If one continuously abides in some particular place in the State for a substantial period of time, he is a resident, in the ordinary sense of the word. A person's residence is ordinarily determined, not by his intention, but by the fact of where he lives.

Further accentuating the unsoundness of its opinion, the Court of Civil Appeals says that "Lawther slept at the barracks at Fort Hoyle," "was an unmarried man," "his

place of abode was in the barracks," and, finally, "it is generally said that a single man's *residence* is where he usually sleeps at night" (Appendix, p. III). Obviously, the Court thus contradicts itself in its holding that the word *residence* necessarily involves the element of intention. Referring to this last quoted language, which is really a statute in this State, it is said by another Texas Court of Civil Appeals in *Major vs. Loy*, 155 S. W. (2) 617, 621: "This very language implies the *exclusion of intention* as an element of the test."

The Court of Civil Appeals says that "the above holding, undoubtedly, is supported by the Texas decisions," citing *Gallagher vs. Gallagher*, 214 S. W. 516, and *Houston Printing Co. vs. Tennant*, 39 S. W. (2) 1089 (Com.), 120 Tex. 539, 76 S. W. (2) 762.

The *Tennant* case simply holds "that the county in which the plaintiff maintains his domicile or legal residence and exercises his franchise and performs his duties and obligations as a citizen is the county where he resides, as that term is used in the *libel venue* statute." The considerations controlling this decision are utterly foreign to the considerations affecting the rather uniform statutes providing for substituted service on non-resident motorists, and in the opinion of the Commission of Appeals (supra), it is noted that—

> "Webster's New International Dictionary defines the word 'reside' as follows: 'Continue to dwell permanently or for a considerable time; *to have a settled abode for a time;* to have one's residence or domicile—' "

selecting the last of these definitions as appropriate for the purpose of the libel venue statute.

The same kind of considerations controlled the construction of our divorce statute with respect to the requirement

of residence in the county where the suit is filed, according to the opinion of the San Antonio Court of Appeals in the Gallagher case, supra, but again the court recognizes (as the same court here refuses to do) the different meanings that can be given the word "reside."

Neither in the opinion of the Court of Civil Appeals nor in the previous briefs of respondents is there any pretense made about relationship, in purpose or otherwise, between this substituted service statute (Section 190A) and the libel venue and divorce statutes involved in those cases.

The Manifest Purpose of Section 190A Was To Prevent Transient Motorists After An Automobile Collision Escaping the Penalties of a Personal Judgment in Damages for Their Wrongdoing.

It is an interesting thing to note that this purpose has not even been debated by respondents in their briefs and arguments in this case, and though in our motion for rehearing we respectfully challenged the Court of Civil Appeals to point out any other reasonable purpose for the enactment of these uniform laws besides that suggested by us, we find nothing in the opinion of that Court giving even nominal consideration to this or any other purpose for the law in question. Instead, the State Court's opinion simply forecloses inquiry as to the legislative purpose of this law by its erroneous insistence that the word "residence" and, therefore, by relation, the word "non-resident", as used in this law, always necessarily involves the element of intention.

What, then, is the purpose of Section 190A?

In the case of *Suit vs. Shailer*, 18 Fed. Supp. 568, 571, it is said by Judge Chestnut of the Maryland Federal Court with respect to this very Maryland statute:

> "The mischief which was intended to be overcome by the statute (Section 190A) was obviously the difficulty of effecting service of summons in the usual way within the state on transient motorists or non-residents who are only temporarily within the state."

The opinion in this case was introduced in evidence (R. 128, para. 31, 183-4, para. 5) in proof of the law of Maryland, and it is entitled to great weight. *Reitz vs. Mealey*, 61 Sup. Ct. R. 24, 28. See also Ward, a Maryland attorney, on the law (R. 81-2, 120-1).

The purpose of the Kentucky legislature in enacting a like statute was said by the Supreme Court of that state in *Mann vs. Humphries' Adm'x.*, 257 Ky. 647, 79 S. W. (2) 17, 20, to be—

> "To relieve the injured person of the extreme hardship of being required to follow the non-resident operator or owner of a motor vehicle into other jurisdictions."

The purpose of the similar New York statute was declared in *Uslan vs. Woronoff*, 18 N. Y. S. (2) 222 (affirmed, 21 N. Y. S. [2] 613), where it is said:

> "The *actual residence* and not domicile is the test for the operation of the statute. * * * The purpose of the statute is to make possible service upon defendants who are not available within the state, and the most reasonable conclusion is to hold that *actual residence*, regardless of domicile, was within the contemplation of the statute."

"The foundation of jurisdiction is physical power." *McDonald vs. Mabee*, 243 U. S. 90. Interpreting this idea, it is said in *Vaughan vs. Love*, 188 Atl. 299, 324 Pa. 276:

> "A resident of one state may be subjected to the jurisdiction of the courts of another while temporarily in the latter. His bodily presence in a state may be taken for jurisdictional purposes equivalent to residence. All persons found within the limits of a government, whether residence be permanent or temporary, are to be deemed subjects thereof for this purpose. When an alien or non-resident is present in a state, whether abiding there temporarily or traveling, the writ will confer on its courts complete jurisdiction over his person. This is the general rule."

Such persons are already within the physical bounds of the state, and it was the purpose of the automobile substituted service law, according to *Bessant vs. P. S. Transportation*, 237 N. Y. S. 689, to provide "effective civil remedy for negligence against the owners of *foreign cars*, who heretofore have been practically immune."

What persons, before the passage of this law, were "practically immune"? Certainly not persons who were physically present in the state, and therefore within its physical power for purposes of personal judgment in its courts. This law must have been designed to reach those persons who before its passage were not within the physical power of the state for purposes of personal judgment—those who were actually living beyond the bounds of the state where the accident happened. It is they, and they only, who could not be reached by ordinary service of summons, nor could personal judgment usually be had against them, either on the basis of publication or non-resident notice, unless that happened to be their domicile.

Turning to the case which the Court of Civil Appeals says is so "easily distinguishable," *Suit vs. Shailer*, 18 Fed. Supp. 568, wherein the wife of a Naval Lieutenant, on duty

at the Naval Academy at Annapolis, but residing outside of the Academy grounds, was held not to be subject to the substituted service provided for by Section 190A, she and her husband having been *actual* residents of Maryland for about two years before the accident and more than a year thereafter, we quote from the opinion of Judge Chestnut as follows:

> "The argument of the plaintiff is *that 'residence' should be construed in the sense of 'domicile'* and that the domicile of the defendant was that of her husband who, *being in the Naval Service and only temporarily assigned to the Naval Academy at Annapolis,* cannot properly be construed as having a domicile in Maryland, as it otherwise appears that *his original domicile* was in another State. * *
>
> "The meaning of the word 'resident' varies with the context and subject matter. When used in connection with the exercise of political rights it may have a different connotation from that given it where it is used to determine property rights. * * * The construction of the term as here used should be made consistent with the particular subject matter. The mischief which was intended to be overcome by the statute was obviously the difficulty of effecting service of summons in the usual way within the state on transient motorists or non-residents who are only temporarily within the state. *But no such condition existed in this case where the defendant was actually residing within the State for two years before the wrong complained of, and for more than a year thereafter.* There is nothing in the case to indicate that she would not have been amenable to service of summons in the ordinary way at any time within a year after the accident, and indeed it appears that she *could not in fact have effectively been sued elsewhere than in Maryland during that period.* * * * Looking at the evident purpose of the Maryland statute and the mischief to

be remedied, it seems apparent that the *plaintiff's contention puts an artificial and strained construction upon the term 'non-resident'* which, for all practical purposes in relation to the subject matter, is far removed from actualities.

"I have found no case which on its facts is sufficiently similar to the instant case to be a precedent for it; and no case which, on the principles applied as to what constitutes non-residence, would indicate that in a case of this nature Mrs. Pickton should be classed as a non-resident. * * *

"It is doubtless true that for certain purposes a citizen of a particular state required by Government service, whether civil or military, to be in another State does not lose his original citizenship even though actually long absent from his own state, and that was doubtless the situation here with regard to Lieut. Pickton who, it may be assumed, retained his citizenship in the State from which he came and did not acquire citizenship in Maryland. 9 R. C. L., title Domicile, Section 14, p. 551. And it may be further *assumed that the defendant as his wife retained her original* citizenship, which was other than that of the State of Maryland. But these principles do not touch the present case where we are concerned with the proper application of the term 'resident' *as used in a very particular statute* passed to meet a *special situation.*

"The plaintiff's argument seeks to establish the non-residence of the defendant on the basis of the assumed non-residence of her husband. It would be difficult, however, to hold *that Lieut. Pickton could have been classed as a non-resident* under this statute *if the accident had occurred from his use of his Maryland registered motor vehicle.* The alleged non-residence of the wife cannot therefore be based on the assumed non-residence of the husband."

The differences against this case, as compared with ours, are that Lawther was living at Fort Hoyle, Maryland, continuously for a longer period, both before and after the accident, and throughout the pendency of the Maryland court proceedings, and the car that he was driving had a Maryland license, and he had a Maryland operator's license. The only difference against our case, as compared with this, is that Lawther lived on the inside of the government reservation, instead of just outside, like Lieutenant Pickton and his wife, but *both* alike were domiciled in another state than Maryland and both he and the Lieutenant, and therefore his wife, were subject to the directing will and intention of the government with respect to their actual location.

The Court of Civil Appeals in its opinion calls attention to the fact that this naval officer and his wife lived outside of the military reservation and that "she did other acts that indicated that she intended to establish a permanent residence within the State of Maryland." We have carefully reviewed the opinion in the *Suit-Shailer* case with a view to determining what these other unidentified acts were, besides renting a house with termination privileges and residing in an apartment house for about a year, and the *only thing* mentioned in the case is that they "had telephone service at both residences." It is true that the opinion also shows that, though the defendant's father's car, which she was driving at the time of the accident, was registered in California, the Lieutenant, her husband, had registered his car in accordance with the Maryland statutes. This, though, could not be what is referred to by the court below, because it is here undisputed that Lieutenant Parker's car, which Lawther was driving at the time of the accident, had been for years before registered under the Maryland law, and in addition Lawther himself had long before the accident procured and still had a Maryland operator's license.

Besides this, in attempted distinction of the *Suit-Shailer* case, the opinion of the Court of Civil Appeals says that "the decision shows that while the officer was subject to military orders *the wife was not*, and therefore went, of her own volition, to the State of Maryland." We had thought that the domicile of the wife was ordinarily that of her husband. *Clements vs. Lacy*, 51 Tex. 150. Even the argument of the plaintiff in the Shailer case, which is shown at the outset of the above quotation, assumed that the "domicile of the defendant was that of her husband," and, as shown in another part of that quotation, it was said that "it may be further assumed that the defendant *as his wife* retained her original citizenship, which was other than the State of Maryland"; and the concluding paragraph of the above quotation from the opinion shows that, far from Judge Chestnut's making any distinction on the score of her not being subject to military orders, the whole theory of plaintiff's case was that she had a vicarious non-residence (domiciliary) in Maryland through her husband, the Lieutenant. As far as volition is concerned, it was assumed there, as it is assumed here, that the soldier, and therefore his wife, retained his citizenship in the state from which he came, and in spite of that it was held there that actual residence, and not domicile, availability to service, and not some unsubstantial and theoretical relationship to some other state, was the thing with which this particular statute was concerned.

The *Suit-Shailer* case is the only thing in point, has been approved generally by the Court of Appeals of the District of Columbia in *Wood vs. White*, 97 Fed. (2) 646, and is shown in a full note in *125 A. L. R. 461* as representing the law in construction of the meaning of the term "non-resident" as used in these uniform substituted process laws.

The opinion of the court below says that *Wagner vs. Scurlock*, 166 Md. 284, 170 Atl. 539, "also supports our holding." If the decision of the Maryland Court of Appeals in that case actually supported the holding of the Court of Civil Appeals, then it is strange that some quotation or statement was not drawn from it, for, if it were really in point, it would be controlling in the construction of the Maryland law. We believe the following things serve to distinguish the Wagner decision, beyond question of doubt:

(a) Judge Chestnut, in the later *Suit-Shailer* case, carefully reviews the *Wagner* opinion, in the light of the acknowledged fact that it would control, if applicable. Assuming that the *Wagner* case is supposed to decide, since it is so contended in the brief of respondents (and we have nothing from the Court of Civil Appeals), "that the term 'residence' as used in this statute meant about the same thing as domicile," we have Judge Chestnut's later opinion, showing that he did not consider this to be the holding in the *Wagner* case, and he directly held (1) that the facts of that case "are utterly different from those we are here dealing with"; and (2) that he found "nothing in that case, whether as to the facts or on the principle stated, to rule the decision in the instant case";

(b) The issue in the *Wagner* case was not one between an actual residence in Maryland and a domicile in Washington, D. C., or elsewhere, as here and in the *Suit-Shailer* case presented, but was between a very real, actual residence and domicile (the two coinciding, instead of differing as here), the permanent place of abode, in Washington, on the one hand, and an utterly artificial domicile, a "merely temporary residence," in Maryland, on the other hand;

(c) Dr. Scurlock, under the evidence in that case, was a *non-resident of Maryland* and a *resident of Washington*, regardless of whether those terms apply to one's domicile

or one's place of actual residence, and the court discusses the matter largely from a domicile angle, because that was the approach most favorable to the Doctor, against whom the ruling was made;

(d) Unlike Lawther, Dr. Scurlock was actually inaccessible to the service of ordinary process in Maryland at the time of the collision, was carrying a District of Columbia car and operator's license, and using the Maryland highways as a transient motorist under the exemption provisions of Section 190, being, therefore, the very kind of non-resident that Section 190A was designed to reach;

(e) The court in the *Wagner* case does not by any dictum undertake to construe Section 190A as being intended to provide substituted service for those who, being within the bounds of Maryland, could already be reached for personal judgment by the ordinary processes of that state, and as against the direct holdings to the contrary in the *Suit-Shailer* case, in the *Mann-Humphrey* case, in the *Bessant-Transportation* case, and in the *Uslan-Woronoff* case, as previously quoted (ante, p. 28), it is not reasonable to infer such an intended holding on the part of the Maryland Court of Appeals.

As previously mentioned, Section 190A is, in only slightly variant form, the practical uniform law throughout this country, Article 2039a being the corresponding statute in this state. Therefore, even aside from the important constitutional principles involved, which we shall later discuss (post, p. 41), as a matter of public policy and welfare, this law should be clearly and uniformly interpreted, so that all who run may read and be governed accordingly. It is well that people should know whether they are to abide the consequences of a default judgment if they ignore a "mail order" summons or citation, or if, on the other hand, as applied to one who was no more a non-resident of the state

for the purpose of availability to ordinary service than were its most permanent citizens, they could safely ignore such "mail order" process as an expedient resorted to by sharp practitioners.

Apparently, the theory of the Court of Civil Appeals is that Lawther's domicile at the time of his first enlistment, that is, Texas, was his residence within the meaning of the Maryland substituted service statute. This theory, strange to say, clashes just as much with the theory of respondents about the matter as it does with our construction of the statute. The only difference is that the opinion of the court below undertakes to argue against our construction, while it utterly ignores the true fact about *the minority of Lawther*, his vicarious domicile in Oklahoma, and the theory of respondents as based thereon. He become 21 in August, 1937 (R. 113), whereas the collision was in April, 1937. (R. 93-4).

In view of the fact that the *Suit-Shailer* case establishes that residence *at the time of the collision* determines the matter for the purpose of this Maryland statute, and in view of the fact that "the domicile (residence, in the sense attributed by the court to this statute) of a minor child is always that of his father, and necessarily changes with any change of the father's domicile" *(G. C. & S. F. Ry. Co. vs. Lemons,* 206 S. W. 75, 5 A. L. R. 943, 109 Tex. 244), the *intent of this minor* that the Court of Civil Appeals has so much to say about would be *utterly immaterial, in any event.*

According to respondents, Lawther took his domicile or residence from that of his parents, which was in Oklahoma at the time of the collision, and not Texas, as held by the Court of Civil Appeals. (R. 117).

In this connection, it is interesting to look to the case of *Eckman vs. Grear,* 187 Atl. 556, a decision by the New Jersey Court of Common Pleas. This was a proceeding to

set aside the service of summons on a minor defendant, who was shown to have been served in a suit for damages on account of an automobile collision under a statute authorizing service in personal actions by leaving a copy of the summons at the defendant's "usual place of abode." It seems that this summons had been left with the defendant's father, at the family dwelling in Camden, N. J., where the defendant had been living with his parents at the time of the accident, but it appears that subsequently, and before the service of such process in the manner shown, he enlisted in the United States Army with his parents' consent, and was sent to the Hawaiian Islands, where he was at the time such service was had in New Jersey. The evidence showed that the boy intended to make a career of his service in the army, and did not intend to return to his parents' home in Camden (just as here, R. 113), and that "he was *subject only to the orders of the government.*" The court said, in holding that New Jersey was not and Hawaii was "the place of abode" of this soldier:

> "An infant secures his domiciliary status from his parent by operation of law, but it does not necessarily follow that the infant's usual place of abode need be in the same place, any more than an adult's domicile and place of abode need be in the same place."

The unsubstantialness, the basic fallacy, of any theory not grounded on the hard fact of actual residence in the sense of availability to ordinary personal service of process, the reason and purpose of the law, is proven by the clash of these two wholly inconsistent theories of residence,—that urged by respondents and that evolved by the Court of Civil Appeals for itself.

Federal Jurisdiction on Government Reservation Immaterial in View of Right to Serve Process Therein.

Section 28 of the Maryland Code which is representative of several like provisions that were also introduced in evidence (R. 124-8, 104-5; post, p. VIII), grants jurisdiction to the United States "upon the express condition that the State of Maryland shall retain a concurrent jurisdiction * * * so far as that civil process in all cases * * * may be executed therein, in the same way and manner as if no jurisdiction had been hereby ceded."

This statute plainly has important bearing on the application of Section 190A to an actual resident upon a military reservation, such as Fort Hoyle, Maryland. In this connection, too, it should be kept in mind "that statutes providing for substituted service of original notice present a method of procedure that is extraordinary in character and allowed only because specially authorized," and such statutes must, therefore, be strictly construed. *Jermaine vs. Graf*, 283 N. W. 428 (Iowa); *Commissioner vs. Maryland Casualty Co.*, 112 Fed. (2) 352, 355 (6th Cir.).

It is a little difficult to follow the reasoning of the Court of Civil Appeals in its holding that, in spite of the acknowledged statutory right of the State of Maryland to serve civil process on this government reservation within its bounds, the government's otherwise complete jurisdiction over this reservation could in any wise affect the status of Lawther as a resident of Maryland for the purpose of this statute (Sec. 190A), which is concerned only with availability to service of civil process. No cases appropriate to this theory are cited, and we can only surmise that the Court had in mind the contention of the respondents as based upon the case of *Lowe vs. Lowe*, 133 Atl. 729, 150 Md. 592, a Maryland divorce suit that they seek to twist

out of its setting, like the Texas divorce suit of *Gallagher vs. Gallagher*, supra.

In that case, the husband, a civilian employee, a resident upon a government ceded area in Maryland, brought the suit. It was considered and ruled by the court that the Maryland statute requiring residence in the state for a divorce was not complied with by a showing of residence on a government reservation that was ceded with a reservation of the right of service of state civil and criminal process upon such site. The court said:

> "It has been universally held that such a reservation does not affect exclusive jurisdiction of such territory by the United States. The only purpose and effect of such reservation is to prevent such sites becoming a place of refuge for criminals or *service dodgers.* * * * The record does not disclose that either of the parties to this divorce proceeding were ever residents of the state of Maryland before the filing of the bill, unless residence on the government reservation also makes them residents of Maryland *for the purpose of invoking the aid of the state courts in obtaining a divorce.* * * * They can exercise no political rights in the state; they are not subject to jury duty; neither can they be taxed for the maintenance of state government, including the courts, and it does not seem unreasonable that the Legislature should require actual residence within the state as a prerequisite for the filing of a bill for divorce."

On the other hand, it seems to us as clear as day that for purposes affected by the expressly reserved right to serve civil process within a government post, residents of such areas are not to be considered non-residents of the

state comprising such areas. To hold otherwise would be to deny effect to the express reservation in the Acts of cession, to contradict the fact of physical presence and availability to process for some sort of vague and theoretical domiciliary intention. It would put the shadow above the substance, deny any effect for the case of *Maurice vs. Worden*, 52 Md. 283 (post, p. 42), which is cited with approval in the Lowe case, and make the holding in that case so far-reaching as to be an utter absurdity.

Before the enactment of Section 190A, Section 28 plainly provided for ordinary personal service of civil process in state suits upon any one living in Fort Hoyle. Such persons, therefore, were not in the attitude of "service dodgers." Why, then, in the name of common-sense, should substituted service be provided by law to reach those who were already amenable, and easily available, to ordinary personal service of process, living for years, day in and day out, at Fort Hoyle?

Exactly why this man Lawther was not served in the way anybody else in Maryland would have been, does not appear above the surface in this case. Be that as it may, no fair-minded person can deny that he *could* have been so served, and, if so, we submit in all confidence, that he *must* have been so served, and that substituted process against him would be utterly void and ineffectual.

Section 153 (post, p. VII) expressly requires personal service by delivery of summons, and it was utterly disregarded by the plaintiffs in these Maryland suits in their haste to take default judgments.

Any Other Construction of Section 190A Would Render It Unconstitutional.

Discrimination Against a Soldier As Such in Not According Him Usual Service of Process.

This case involves principles far more important than the incidental effect upon the parties to it. One of these principles stands now at white heat in this country. *Is it right that a penalty should be put upon a soldier and a discrimination made against him on account of his being in the service of his country?*

We are here making no question whatever about a soldier's ordinarily not enjoying such privileges of citizenship as the right to obtain a divorce in the place where he happens to be stationed. This right is denied him there because it is inherent in citizenship or domicile, just like the right to vote or enjoy school benefits or subjection to taxation. The reason of the law, though, is the spirit of it, and where the reason of it, as here, looks to accessibility to service of process in the ordinary way, we say that it is an *unjust and unlawful discrimination* against the soldier living on a government reservation to permit personal judgment against him on the basis of substituted service of process upon him, when equally available to personal service by delivery of summons, as required by Section 153 to be had upon any other person actually residing in the state. We say that it was a *denial of the equal protection* of the law for the Maryland courts to render default judgments against Lawther when, under the various provisions of the law of that state, as already shown, he could be reached by process as well on the government reservation as outside of the reservation. The Fourteenth Amendment of the Federal Constitution still means something in this land.

In the case of *Maurice vs. Worden*, 52 Md. 283, 291 (R. 128, para. 32, 183-4, para. 5), it is held that as ordinary process could reach the defendant under express reservation in the government's grant, while residing *in the territory* ceded to the United States for the Naval Academy, said defendant was not "out of the state" within the provisions of the law staying limitation and "could be reached by the process of the court." The same identical reservation for purposes of service were proven in our case in connection with the cession to the United States of Fort Hoyle.

In what conceivable way does this "full and complete Federal jurisdiction," mentioned in the opinion herein (Appendix, p. V), control, affect, diminish or add to the right to avail of the special method of service provided by Section 190A? If that statute looks to accessibility to service, it is patently unnecessary to reach a soldier living in the barracks on this Maryland reservation, day by day, for two years before and two years after the accident, on account of the reserved right "to go upon the reservation for the purpose of serving process." Is it reasonable to suppose that this soldier, living in Fort Hoyle, Maryland, is a "non-resident" for the purposes of Section 190A, and at the same time is not "out of the state" for the purposes of being sued, as held in *Maurice vs. Worden*, supra?

What basis for holding this soldier to "mail-order" service of process while according to all others physically resident in Maryland personal service of process is found in any of the following argumentative facts set out in the lower court's opinion:

(a) That "he went to Maryland not upon his own volition, but strictly in obedience to military orders"?

(b) That "when he arrived in Fort Hoyle he did not evidence by any acts an intention to there establish a res-

idence of any kind" and that he "bought no property, neither did he rent any"?

(c) That "his place of abode was in the barracks on the military reservation furnished him by the Government"?

(d) That "if he had received orders the next day, or the next month, transferring him to another fort, he no doubt stood ready to obey such order"?

(e) That "the military reservation upon which Lawther *had his place of abode* was not territory belonging to the State of Maryland, but was territory which had been ceded to the United States Government"?

If there is in these things, which are typical of any soldier, no reasonable basis for a discrimination against Lawther in this matter of process, for denying to him a personal delivery of summons as a condition of personal judgment, then, by the uniform decisions of the United States Supreme Court, the Maryland judgments constituted a discrimination against this soldier for reasons inherent in the fact that he was a soldier in the service of his country. There is nothing in the terms of Section 190A that would seem to warrant such construction, but the discrimination consists in the rendition of the default judgments against Lawther as based only upon substituted service under Section 190A.

Classification in a law must have some substantial relation to the object of the legislation, and a court cannot discriminate against a soldier by requiring substantially less in service of process upon him than it requires of others similarly situated.

DEPRIVATION OF THIS SOLDIER'S PROPERTY WITHOUT DUE PROCESS OF LAW IN THE MATTER OF PERSONAL SERVICE.

Maryland, for general purposes, has prescribed by Sections 153 and 182 of its code (post, p. VII; R. 124, 127) personal service by delivery of summons, and its highest court has said in *Wilmer vs. Epstein*, 81 Atl. 379, 116 Md. 140 (R. 128, para. 34, 183-4, para. 5), "that, before a valid judgment in personam can be rendered, jurisdiction of the person of the defendant must be acquired either by personal service of process upon him or by his voluntary appearance", and that, "under our statute, it is only where direct service upon the person sued is prevented within the jurisdiction * * * that constructive or substituted service is permitted". Maryland, for certain limited purposes, has prescribed by Section 190A substituted service on "non-residents"; those, in other words, who could not be reached by the ordinary service of process prescribed by Section 153. The special statute was designed, not to displace the previous general one, but to supply its deficiencies.

Lawther's temporary residence in Maryland from 1935 until 1939 rendered him amenable to the general rule above prescribed *(McDonald vs. Mabee*, 243 U. S. 90, 91; *Vaughan vs. Love*, 188 Atl. 299, 324 Pa. 276), and in spite of his residence on the government reservation he "could be reached by the process of the court" *(Maurice vs. Worden* 52 Md. 283, 291; *Watts vs. McCloud*, 205 S. W. 381 [writ refused]), and substituted service upon him was, therefore, inappropriate and void. *Wilmer vs. Epstein*, supra; *Kitchen vs. Crawford*, 13 Tex. 516, 521.

Due process of law for him, as prescribed by Maryland in Section 153, required personal service, and a rendition of judgment by its courts merely upon the substituted service provided by Section 190A constituted a denial of due process of law.

This question is unrelated to the sufficiency of the notice required by Section 190A, and it does not go to the law at all, but to the validity of the action of the Maryland courts under the law. However, in some of the cases reviewed the defect is found in the law rather than in the action taken under it, but they are helpful by analogy.

In *Bardwell vs. Anderson*, 46 N. W. 315, 44 Minn. 97 an action to enforce a mechanic's lien, in which foreclosure was considered and treated as a matter of personal judgment, it is said:

> "The only remaining question, therefore, is whether it is competent for the legislature to authorize such service (by publication) in such actions upon residents of the state personally present, and capable of being found, and personally served, within its jurisdiction. Is such service 'due process of law?' * * * What we do mean to assert is that the right to resort to such constructive or substituted service in personal actions proceeding according to the course of the common law rests *upon the necessities of the case*, and has always been limited and restricted to cases *where personal service could not be made because the defendant was a non-resident*, or had absconded or had concealed himself for the purpose of avoiding service. * * * Service by publication, under such circumstances, is not 'due process of law,' and therefore any statute assuming to authorize it is unconstitutional." See also *McNamara vs. Casserly*, 63 N. W. 880, 884-5, 61 Minn. 335; *Roberts vs. Roberts*, 161 N. W. 148, 135 Minn. 397; *Town of Hinckley vs. Kettle River Co.*, 72 N. W. 835, 836, 70 Minn. 105; *Bear Lake County vs. Budge*, 75 Pac. 614, 616-17; 9 Idaho 703; *Hockaday vs. Jones*, 56 Pac. 1054, 1055, 8 Okla. 156.

The emphasis in all of these cases is upon the fact that the defendant was personally present within the state and

could be found therein. Exactly in line with this, we have here the undisputed fact that Lawther, at any time through the period of the collision and the ensuing suits, could have been found at Fort Hoyle, Maryland, by any sheriff seeking to serve him with personal process (R. 117).

By the same reasoning, it is beyond the power of the Maryland courts to apply Section 190A so as to support personal judgments by default against Lawther with merely substituted service upon him. These judgments being void for want of personal jurisdiction, cannot be here made the basis of judgment against the insurance company.

LAWTHER'S USE OF HIGHWAYS NOT AN APPOINTMENT FOR PURPOSE OF SUBSTITUTED PROCESS.

Sections 179 and 192, the Maryland motor vehicle license law (R. 122, 103), is applicable to an automobile belonging to an actual resident of Maryland, irrespective of domicile *(Robinson vs. Fix,* 151 Sou. 512, 113 Fla. 151), and even though the owner resides on a Federal military reservation, such as Fort Hoyle. *Storaasli vs. Minnesota,* 283 U. S. 57. Accordingly, Lieutenant Daniel Parker, the owner of this car, had bought a Maryland license, which the car carried at the time of the collision (R. 106, 116-7).

Sections 186 and 188 of the Maryland code provide for a license for operators of motor vehicles (R. 100-3), and Section 190 of that code makes the requirements of this operator's license law applicable to persons " who have temporary residences in this state for periods in excess of three months in any year" (R. 99-100). In compliance with this provision Lawther, long before the collision, had procured and was using a Maryland operator's license (R. 110, 116).

In *Suit vs. Shailer,* 18 Fed. Sup. 568, 569, it is said that "Section 190A is in pari materia with the preceding Section

190," and in this connection it refers to the exclusion from exemption of non-residents having temporary residences in Maryland for more than three months, and at page 570 it is said:

> "It is not without significance, however, that the privilege to use the State highways without complying with local registration laws is limited to a period of three months for non-residents. It is also important to note that the form of substituted service authorized by Section 190A is made to apply to a non-resident exercising the privilege of using the Maryland highways under Section 190."

The opinion still further declares that it would be difficult "to hold that Lieutenant Pickton could have been classed as a non-resident under this statute, if the accident had occurred from his use of his Maryland registered motor vehicle," citing *Clesas vs. Hurley Machine Co.*, 52 R. I. 69, 157 Atl. 426. In other words, the substituted service statute should not be considered as applying to Lieutenant Parker, because he could not be classed as a non-resident under the statute, if the accident had occurred from his use of his Maryland registered motor vehicle.

Lawther, before this accident, having been using the Maryland highways for more than three months—in fact for about two years—had bought and paid for that right by license and could not be fairly burdened with a statutory condition of implied appointment of the Secretary of State as his agent for service purposes, but by his operator's license Lawther had put himself on a parity with all other residents of Maryland, and it would be a denial of due process of law to construe his acceptance under these conditions of "the rights and privileges of using the roads and highways of Maryland" as the "equivalent to an appointment"

of a state officer "to be his attorney upon whom may be served all lawful process" as provided by Section 190A (Appendix, p. VI). The substituted service had upon him depending upon such constructive appointment must, therefore, fail, rendering the Maryland judgments void as depriving Lawther of his property without due process.

In this connection, this court in *Hess vs. Pawloski*, 274 U. S. 352, 356-7, justified the similar Massachusetts substituted service Act upon the theory that the state, having the power to exclude a non-resident, might declare the use of its highways by them the equivalent of the appointment of a state officer for purposes of process. The distinction here is that the State of Maryland, by the explicit terms of Section 190 (Appendix, pp. VI-VII), invited and required the payment by Lawther of an operator's license tax, and after he had complied and was using the highways in that capacity, the statutory declaration as to use being the equivalent of appointment and agreement could have no fair application to him. Like the stockholders in the case of *Pink vs. A. A. A. Highway Express*, 62 Sup. Ct. R. 241, 245, Lawther had "done no act signifying such consent."

More particularly is this true in the Amend case and the separate award made to that respondent, because that suit was filed in Maryland and the process had during the month of June, 1937 (R. 65-7), whereas, Lawther was a minor until August, 1937. When an infant is made a party to an action he must be served with process and he cannot waive service like an adult, nor authorize anybody else to do so for him. *Wright vs. Jones*, 52 S. W. (2d) 247, 251 (Tex. Com. Appls.).

Clearly, the facts and circumstances before shown do not justify any different classification for Lawther and others like him, who had temporary residences in Maryland for periods in excess of three months in any year. They and permanent residents alike have responded to the police power of the state in the matter of paying for their required operators' licenses, and there was no distinction in their situation such as could justify the state in declaring that use of the highways by such non-resident licensed operators would be equivalent to an appointment of a state officer for purposes of substituted service, and at the same time requiring for the benefit of its permanent residents actual personal service of process as a basis for judgments in personam.

In *Ex Parte Baker*, 78 S. W. (2d) 610, 616, the Court of Criminal Appeals of Texas says:

> "An ordinance which attempts to distinguish between persons engaged in the same or like business merely on the basis of their residence or the location of their business houses is in contravention of the constitutional provisions hereinabove quoted (including the Fourteenth Amendment). We think such ordinance, whether it purports to be an exercise of the police power or the power to tax, is discriminatory in that it is not based upon any reasonable classification." (See also *Myers vs. City of Defiance*, 36 N. E. (2d) 162, 67 Ohio App. 159; *Ward Baking Co. vs. City of Fernandina*, 29 Fed. (2d) 789 (D. C.); *Campbell Baking Co. vs. City of Harrisonville*, 19 Fed. (2d) 159 (D. C.).

It is distinctly provided by Section 190 (Appendix, p. VI) that "the privilege to operate motor vehicles in Maryland granted non-residents * * * may be * * * revoked * * * for

any cause for which he (the Commissioner) is authorized to * * * revoke the license of any resident of Maryland." This implies that there may be no revocation of a non-resident's license except for cause authorizing the revocation of a resident's license. It contemplates an equal protection of the license law that would be violated by a construction that in effect automatically revokes Lawther's operator's license in order to imply his appointment and consent to the substituted service of process upon the Secretary of State.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Court of Civil Appeals.

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